Supreme Court, U.S.
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No. 91-830

IN THE

# Supreme Court of The United States

OCTOBER TERM, 1991

AVALA OF TEXAS, INC., d/b/a THE AVALA GROUP
AND d/b/a PLYMOUTH PARK SHOPPING CENTER
AND
INTERSHOP REAL ESTATE SERVICES, INC.,
f/k/a HFA MANAGEMENT USA CO.,
*Petitioners*

v.

THE HONORABLE DAVID WEST
JUDGE OF THE 269TH DISTRICT COURT
HARRIS COUNTY, TEXAS
AND
THE HONORABLE COURT OF APPEALS
FOR THE FIRST DISTRICT OF TEXAS,
*Respondents*

***ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS***

## PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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## REPLY TO RESPONDENTS' REASONS FOR DENYING CERTIORARI[1]

Respondents' Brief in Opposition proposes four reasons for denying certiorari, each of which is meritless:

[1] Petitioners would like to bring to the Court's attention a development that has occurred since Petitioners filed their petition for certiorari on November 25, 1991. On page 9 of the

1. Respondents first contend that Petitioners[2] failed to raise their equal protection claims in the Texas state courts. That contention is wrong.

Petitioners are making the same constitutional challenges — including the same equal protection challenges — in this Court that they made in the Texas state courts. In their petition for certiorari, Petitioners complain that the Texas treatment of new trial orders violates the Equal Protection Clause because Texas courts will grant mandamus review of new trial orders that are void or based on a perceived conflict in jury answers, but will not review any other new trial orders no matter how blatantly erroneous they may be. (Pet. at 18-20). Petitioners further point out that the unavailability of mandamus review for new trial orders falling outside of the two exceptions is not only unequal compared with the reviewability of new trial orders falling within the two exceptions, but also compared with the widespread availability of mandamus review for other kinds of trial court orders in Texas. (Pet. 19-20 & n.40).

Petitioners raised the same complaints in the Texas state courts. In both the Texas Court of Appeals and the Texas Supreme Court, Petitioners expressly stated that they were challenging "the unjust and unconstitutional rule" shielding a trial judge's order granting a new trial from review "unless the order is wholly void or expressly based on a perceived conflict in jury answers." (App. at K-3, N-4; *see* Pet. at 6, 8). Petitioners then explained the historical genesis of the two exceptions and argued that restriction of mandamus review

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petition, Petitioners stated that a second trial in this matter was scheduled to begin on December 9, 1991. The trial date has now been continued until March 2, 1992.

[2] For a listing of Petitioners' parent companies and non-wholly owned subsidiaries pursuant to Supreme Court Rule 29.1, see Pet. at iv.

to those two exceptions should be rejected.[3] (App. at K-14 to K-18, N-15 to N-19; *see* Pet. at 12 n.25). Petitioners stressed that every other kind of trial court order is subject to some kind of review under the Texas system and argued that the peculiar treatment of new trial orders is unconstitutional. (App. at K-19, N-20). Petitioners specifically relied on the Equal Protection Clause as a basis for challenging the Texas rule of law in question. (App. at K-19, N-20).

In determining whether Petitioners' equal protection claim was adequately presented to the Texas courts, "[n]o particular form of words or phrases is essential" so long as the claim was brought to the state courts' attention with "fair precision." *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928). Thus, "if the record as a whole shows either expressly or by clear intendment" that Petitioners' equal protection claim was raised, then "the claim is to be regarded as having been adequately presented." *Id.* In arguing that Petitioners' equal protection claim "was never presented to the Texas courts," Respondents ignore the entirety of the record and instead quote a single sentence fragment out of context.[4] (Resp't Br. at 2). Because the

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[3] The frivolousness of Respondents' contention that Petitioners did not adequately complain of the peculiar treatment afforded the two exceptions is evident from the fact that Respondents themselves explicitly referred to the two exceptions in framing the "QUESTIONS PRESENTED" before the Texas state courts. (App. at L-2 to L-3 & n.2, O-2 to O-3 & n.2; *see* Pet. at 7, 8).

[4] Although Respondents assert that Petitioners' equal protection claim was "unsupported by authority" at the state court level (Resp't Br. at 2), Petitioners' claim was in fact supported by citations to the Fifth and Fourteenth Amendments of the Constitution. (App. at K-19, K-21, N-20, N-22). Moreover, this Court's "jurisdiction does not depend on citation to book and verse." *Eddings v. Oklahoma*, 455 U.S. 104, 113 n.9 (1982).

record as a whole shows that Petitioners' federal equal protection claim was raised in the Texas state courts, the claim was adequately presented.

Respondents' reliance on *Beck v. Washington*, 369 U.S. 541 (1962), for the proposition that Petitioners did not adequately present their equal protection complaint at the state court level is misplaced. In *Beck*, unlike the present case, the petitioner's constitutional attack at the state court level never identified the rule under attack, "much less argue[d] that a restrictive interpretation would be unconstitutional under the Equal Protection Clause." *Id.* at 550; *see* App. at K-19, K-21, N-20, N-22. *Beck* is also inapposite because, unlike this case, the petitioner's equal protection claim "was not within the scope of the questions to which the writ of certiorari . . . was specifically limited." 369 U.S. at 554; *see* Pet. at i.

Finally, contrary to Respondents' argument, Petitioners do not claim to have been "unconstitutionally discriminated against" merely because they were "unable to secure mandamus *relief*." (Resp't Br. at 2 n.1 (emphasis added)). Rather, Petitioners' equal protection claim is based on their inability even to secure mandamus *review* — although mandamus review of new trial orders is available in two arbitrarily determined situations. (Pet. at 18-20).

2. Respondents also contend that certiorari should be denied because the Texas Supreme Court's judgment rests on "an adequate and independent state ground within the meaning of this Court's decision in *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945)" (Resp't Br. at 3). Respondents' contention must be rejected for at least two reasons.

First, and most significantly, Respondents' analysis of the adequate and independent state grounds doctrine is fundamentally flawed. Under that doctrine, the Supreme Court can not review a state court's decision if the decision rests on

an adequate and independent state ground. In the present case, Respondents argue that "it is probable that the Supreme Court of Texas denied leave to file [the petition for writ of mandamus] because under the Texas decisions mandamus was not available." (Resp't Br. at 3). Since the unavailability of mandamus review was the very aspect of Texas law that Petitioners sought to challenge as violative of the federal constitution, the fact that Texas law does not provide mandamus review can hardly be classified as an adequate and independent state ground for the Texas Supreme Court's decision in this case. As one noted commentator has observed, "[s]tate procedural rulings cannot be found to be independent of a claim that the procedural rulings themselves cause a denial of due process." 16 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4025, at 727 (1977).

In the second place, this Court has expressly disapproved *Herb* and has superseded its approach. *See Michigan v. Long*, 463 U.S. 1032, 1038-39, 1042 & n.7 (1983). This Court's current approach is to *presume* that no adequate and independent state grounds exist [1] "when it is not clear from the opinion itself that the state court relied upon an adequate and independent state ground and [2] when it fairly appears that the state court rested its decision primarily on federal law." *Id.* at 1042. Respondents' argument fails to overcome this presumption. First, the Texas Supreme Court's judgment nowhere reveals that it rests on state grounds. (*See* Apps. A, B). Second, as Petitioners argued in their petition for certiorari, the necessary effect of the Texas Supreme Court's denial of leave to file the petition for mandamus was to reject Petitioners' federal constitutional challenges. (Pet. at 9 n.6). It should be noted that Respondents themselves urged the Texas Supreme Court to deny Petitioners' due process and equal protection challenges on the basis

of this Court's decisions of federal constitutional law. (*See* App. at O-6 to O-8).

3. Respondents' contention that the issue whether a litigant may obtain review of a new trial order by mandamus is "so absolutely devoid of merit as to be frivolous" (Resp't Br. at 3) is itself frivolous since this Court deemed a similar issue certworthy in *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33 (1980) (per curiam).

*Daiflon* did not, however, resolve the questions raised in this proceeding. Whereas *Daiflon* held that mandamus was not available to review a federal court's new trial order when the litigant had a remedy by appeal, 449 U.S. at 35-36, the present case involves a mandamus action to review a state court's new trial order when there is *no* remedy by appeal (Pet. at 12), and when the state has created mandamus review for new trial orders, but has arbitrarily limited such review to two circumstances (Pet. at 18-19). These distinctions, as well as others, raise important and unresolved questions of due process and equal protection deserving of this Court's plenary consideration. (*See* Pet. at 14-15).

Furthermore, the questions presented are properly before the Court at this time because in this proceeding Petitioners are challenging the unavailability of mandamus review (Pet. at i, 9-10) — not, as Respondents apparently would have the Court believe, the unavailability of appeal after retrial (Resp't Br. at 4 & n.6). While the unavailability of review after a second trial may affect this Court's analysis of the constitutionality of the Texas treatment of new trial orders, it certainly does not follow that Petitioners must undergo the hardship and expense of a second trial — which are part of the very harm that Petitioners seek to avoid — before they can challenge the constitutionality of the unavailability of mandamus review under the Texas system. The questions

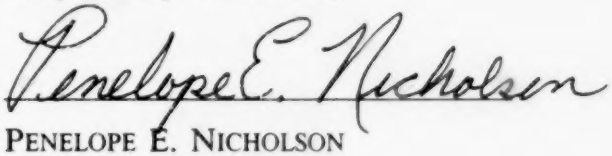
contained in the petition for certiorari are properly before the Court now.

4. Respondents' last reason for denying certiorari is that this Court should not grant certiorari in order to review evidence or resolve factual disputes. (Resp't Br. at 4 & n.8). Petitioners have never contended that certiorari should be granted for those reasons. Petitioners explicitly excluded Question 3 (which relates to whether the trial court abused its discretion in granting a new trial) from the reasons why this Court should grant certiorari and merely reserved the right to argue Question 3 in the event that certiorari is granted on Questions 1 and 2. (*See* Pet. at ii, 21).

## CONCLUSION

For these reasons, as well as the reasons set forth in the petition for writ of certiorari, Petitioners respectfully request that the Court grant the petition for writ of certiorari and that the Court grant all relief requested in the petition for writ of certiorari.

Respectfully submitted,



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